EXHIBIT I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HERMÈS INTERNATIONAL, et al.,

Plaintiffs,

v. 22 Civ. 384 (JSR)

MASON ROTHSCHILD,

Defendant. Trial

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New York, N.Y.
February 6, 2023
9:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge
-and a Jury-

APPEARANCES

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CHRISTOPHER SPRIGMAN

BY MR. MILLSAPS:

Q. If you could go on with what you were explaining about this, Dr. Neal.

A. Right. So, going back to the test and the control, you've seen the MetaBirkins website or the control, where he's removed those elements that I've mentioned. And you literally just count up the number of people who mention the plaintiff as either making or providing the items or sponsoring, approving, or authorizing them.

In his analysis that he presented to you, he said that in his test cell 21.6 percent of people identified the plaintiff. And in the control, it was only 2.9. So what we do is we subtract the control number from the test, and that we call that number the net confusion number. That's 18.7.

So, so far what I have done is I have just explained to you what he did and how he reached that conclusion, and now I am going to explain to you what was wrong with that.

MR. MILLSAPS: Ashley, if you could go to the next slide.

BY MR. MILLSAPS:

Q. Dr. Neal, you mentioned this flaw No. 1, a misclassification by Dr. Isaacson of respondents.

Could you explain that.

A. Yes. So the basic idea is that he counted a whole bunch of people as confused who actually were not confused. And the

reason for this is he ignored something called the playback problem. And this is a problem is that arises in particular surveys, not all of them, but it arises any time when the plaintiff and the defendant are using the same name, right?

So actually the originally case, the first one ever done back in 1975 faced exactly this problem because it was one company using the name and the other company using the name .

What does that mean?

It means that if you show people the defendant's product, so here that would be the MetaBirkins website, and you ask who puts this out, people are just going to read back the name if that is on the screen, right? And you don't know from that whether they're really thinking about the plaintiff or they're just reading back the word that you saw on the screen.

And I will give you an example to make it a bit more concrete in a minute, but the critical point is there's a solution to the playback problem, and ever since 1975 the solution has been to add this extra question. And interestingly, Dr. Isaacson did include it.

So it's question 4 here, right? "What other brands or products do you think are made by whoever makes or provides the items shown on the web page?"

So if we move to the next screen, I will show you how this helps us solve that playback problem.

Okay. So I just wanted to give you an example of

the stimulus, the MetaBirkins website that people saw, right?

Just to remind you, that there is a lot of information on it, and there's a lot of brands popping up here, right?

So the word "MetaBirkins" appears. The word "Birkins" appears. The word "Hermès" appears in I think three other spots. So do other names, like, "Forbes," "Twitter," "Preview."

Now, the problem is, if you put a stimulus like this in front of a survey respondent and you say, who puts this out? The survey respondent just wants to be helpful, and so they'll start guessing. They will be like, I don't know, Twitter or Forbes. Forbes is written here.

So you end up with a lot of answers like that that don't really reflect confusion. It is not really the person thinking, oh, I think Forbes magazine puts out this NFT. They're basically just parroting back, or playing back, the names that are on the screen.

So if we can move on to the next slide, I'll show you how we use the data from that extra question to solve this problem.

Q. We are about to move on to that slide, Dr. Neal. I just wanted to ask you about the slide we were just looking at.

We saw some little red dotted lines.

Did you add those to that?

A. Yes. Just to show where the marks Hermès, Birkin,

MetaBirkin were located on that screen.

Q. And sorry, if you could just go back to that?

BY MR. MILLSAPS:

Q. Dr. Neal, what is this that we are looking at now?

A. This is basically the same thing, but from the desktop version of his survey. Some people went through on a smart phone; some people went through on a desktop. They saw the same information, but it just looked a little bit different.

MR. MILLSAPS: Okay.

Ashley, if we could go to the next slide.

BY MR. MILLSAPS:

Q. So is there a way to fix this flaw?

A. There is. And it dates back to 1975. So I want to explain to you how we used the answer to that extra question that fortunately Dr. Isaacson did include. It's the Q4 one here. But he ignored the data from it.

So let's look at example person 1. These are real people from Dr. Isaacson's data. I didn't make up these answers. These are real actual respondents from his survey.

So person 1, when they got asked question 1, "Who makes or provides the items shown on the web page?" they said Birkin.

Okay. And then at Q4 when they were asked, well, "What other brands or products do you think are made by Birkin?" because they just indicated Birkin, they said, "Birkin

makes real bags that are incredibly popular for people to own and carry." Right?

So that person is confused. Dr. Isaacson was a hundred percent correct to classify that person as confused, because they said Birkin, and then they successfully identified at least some good put out by Hermès.

The same cannot be said of person 2. Person 2 also said Birkins for question 1, but when they were asked, "What other brands or products do you think are made by whoever makes or provides Birkins?" they said Forbes.

Now, Forbes is a magazine. Forbes was just one of the other brands that was shown to them on the previous screen. So this person has failed that playback test. They are obviously just trying to be helpful, and they are writing in brand names that they saw on the previous screen. So that person should not have been classified as confused.

The critical issue here is that Dr. Isaacson only got to 18.7 percent by totally ignoring all of these Q4 answers, right? So what he did is he classified both of these people as confused.

That was a mistake, because he ignored the playback rule, and he ignored this time-honored method that dates back right to the very first survey for dealing with this known problem. And because he misclassified a whole bunch of people, that drove up his confusion number. That's the only way he got

it up to 18.7 percent.

MR. MILLSAPS: Ashley, if we could go to the next slide.

BY MR. MILLSAPS:

Q. Did you recode the data in a proper fashion?

A. I did. It is a little bit hard to see on this screen, but basically what I did was I went through and found every single person that Dr. Isaacson said was confused. Then I looked at their Q4 responses to see whether they really were confused or not, right? Did they identify Hermès or Birkin and then successfully go on to identify some good put out by Hermès?

And the answer is that some do, but a whole bunch don't, right? So all the ones in green are people who successfully passed the playback test. And the ones in red, those are the people he misclassified as confused who actually are not.

MR. MILLSAPS: Can we go to the next -- oh.

BY MR. MILLSAPS:

Q. After accurately coding the data, what was your finding again, Dr. Neal and what is the significance of that?

MS. WILCOX: Objection.

THE COURT: Well, it is a compound question. Break it down.

MR. MILLSAPS: Okay.

Yes, I will do that, your Honor.

Thank you.

BY MR. MILLSAPS:

Q. Dr. Isaacson, could you just tell us what the implications of this first flaw were.

A. Okay. So the main implication is that when Dr. Isaacson said he got 18.7 percent confusion, he was wrong. He actually got 9.3 percent confusion. That's the first takeaway.

Q. And what is the significance of that number, Dr. Neal, again?

A. As I said before, the kind of magic number, the minimum threshold that most experts cite to, is 15 percent. So it's only if you get 15 percent or above that you can reach a conclusion that confusion exists.

THE COURT: Just so we're clear, that's not a rule that's set by law. It's just set by the convention among people who do these kinds of surveys, yes?

THE WITNESS: Yes, sir.

That's right.

THE COURT: Very good.

Go ahead.

MR. MILLSAPS: Can we go to the next slide Ashley.

BY MR. MILLSAPS:

Q. Dr. Neal, you mentioned that there was also a second flaw in the NFT purchaser survey.

Could you explain what that flaw is.

A. Sure. So Dr. Isaacson's job was to work out if people were confused about who puts out the NFT, right? That's really important. He needed to work out if people were confused about who puts out the NFT.

The confusion questions he used don't even make mention of an NFT. Instead, he used vague language that I've got here on the screen. He says, "Who makes or provides the items shown on the web page?" or "Who sponsors approves or authorizes the items shown on the web page?"

That might seem like a subtle distinction, you know, NFT versus items, but when you look at the answers that people gave in the survey, it's quite obvious that multiple people were confused by this, and they interpreted it as asking them about who puts out the real-world handbags that are artistically depicted, right?

So they didn't interpret it as being asked about who's behind the NFT. They interpreted it as who's behind the real-world handbags that may be artistically depicted in the NFT.

And so of course if a person, for example, was aware of Birkin handbags and could see that this was an artistic depiction of a Birkin, they might think, well, this is asking me who puts out the real-world handbag. And that answer would be Hermès. But that's not confusion about the source of the NFT. That's someone accurately saying Hermès puts out the

real-world handbag.

So this is a real problem for his survey, because his survey had to establish that people were confused specifically about the source of the NFT. And as I said, it's obvious from looking at people's answers that a bunch of people didn't interpret it that way. And that in turn would have inflated the confusion rate even further.

Q. Is there a way to correct for this flaw like you were able to correct for flaw number 1?

A. Unfortunately, not that I could think of. There's no way to reanalyze the data to fix this. The only thing I can say is that we know that it would have pushed up the confusion rate in an artificial way.

MR. MILLSAPS: Ashley, could we go to the next slide.

BY MR. MILLSAPS:

Q. Actually, before we get to the next slide, Dr. Neal, you mentioned there were some other flaws that you haven't included in the slides here. Is there any other flaw that you found that you would say is consequential in some way here?

A. Perhaps one more would be is that, as I understand it, only the word "Birkin" and the trade dress and the word "MetaBirkins" are accused of causing confusion. But Dr. Isaacson's design also included the word "Hermès" in the test, and it missing in the control.

Now, what does that mean?

A. Yes, I have.

Q. So would it be accurate to describe Dr. Isaacson's purported finding of 18.7 percent confusion as meaning that there's substantial likelihood of confusion?

THE COURT: Sustained.

MS. WILCOX: Thank you, your Honor.

BY MR. MILLSAPS:

Q. Dr. Neal, my last question: Do you consider 18.7 percent confusion to be a substantial likelihood of confusion?

A. No, I do not. I would characterize it as barely above the minimum.

MR. MILLSAPS: Thank you.

No further questions, your Honor.

THE COURT: Just so that I am clear, so the people who run these kind of surveys, as I understand your testimony, have decided among themselves that the cutoff point is 15 percent, right?

THE WITNESS: Well, I would probably characterize it as partly driven by the experts and partly driven by courts, because, of course, courts have accepted different numbers.

THE COURT: Courts have accepted different numbers, and the question of what the courts have decided is entirely for the Court, not for a witness.

THE WITNESS: Yes. That's my understanding.

THE COURT: So, going back to what is in your domain,

what the experts have chosen, so if the cutoff is 15 percent, and you think that, well, even though this -- if the study had been done properly that would have been above the cutoff, but you say it's not really as good as a higher figure, then why doesn't that cut the other way? If it's 9 percent, as you calculate, while that's below the cutoff, it is still some confusion, not no confusion. True?

THE WITNESS: Well, my understanding is that courts and experts have taken the position that every survey has some noise in it. And so you are unlikely to get zero purely because of noise. So a 9 percent figure actually could effectively be zero because it's so small it could just be the product of noise.

THE COURT: But in this case, you very helpfully undertook to look at the actual responses so the impact of noise was minimized under your analysis because you got more deeply into the data. Yes?

THE WITNESS: That's fair to say.

THE COURT: Okay.

Go ahead, counsel.

CROSS-EXAMINATION

BY MS. WILCOX:

Q. Good morning, Dr. Neal.

A. Nice to see you again.

Q. Nice to see you. I last saw you on Zoom a world away.

pseudonymous individuals. We have Mr. Rothschild's claims to have interacted with some of these purchasers, and we don't have a single piece of corroborating evidence.

And, Mr. Rothschild, he hasn't proved completely trustworthy. We do have Mr. Rothschild's other social media. You will see here three separate entries across two pages where potential purchasers were confused, and one purchaser clearly thought she was getting a bag.

And while Mr. Rothschild's counsel might tell you that we cannot trust these people, we know that Mr. Rothschild never responded to them.

We also know that Mr. Rothschild was leaning into this confusion. Not only did he use the Birkin name, and not only did Mark Design create these bags using the schematic and Hermès Birkin bag, but before the cease and desist, Mr. Rothschild actually teased a charm, and that was meant to look like the rodeo charm, as we know.

We also know that there was a survey. We have heard a lot about that for the last few days. And it was done by the top survey expert, Dr. Isaacson. Dr. Isaacson found that the net confusion was 189.7 percent. That means about one in five people seeing Mr. Rothschild's website with the disclaimer were confused.

If we are to listen to Dr. Neal, it is one in ten. Again, this factor is not close. People are confused.

three prior art projects are appropriated. His first project was the college shirts with the college logo. He admits that at least one of those schools, Parsons here in New York, sent him a cease and desist letter.

This MetaBirkins project was going to be his biggest and it wasn't even close. Mr. Rothschild told his friends and associates, some of whom were potential investors, that he was planning to collaborate with Hermès.

We saw that on December 2, 2021. Mr. Rothschild texted Lauren from Basic.Space that he was going to be speaking to Hermès on December 4, 2021.

He testified that Mr. Clement Quan, a fashion industry executive -- I'm sorry this is December 7, 2021. He testified that Mr. Clement Quan, a fashion industry executive, was planning to communicate with Hermès on his behalf.

You see no documents showing that Mr. Rothschild had any discussions with Mr. Quan or Mr. Quan saying that he called. While Mr. Rothschild testified that Mr. Quan knew people at Hermès, in Hermès' promotions department, he never said whom he knew, and Mr. Rothschild claims he never followed up with Mr. Quan. And you heard Ms. Vittadini. She said she had never heard of Mr. Quan.

But there are internal inconsistencies here as well. In between December 1 and December 7, Mr. Rothschild claimed to have two other people reaching out to Hermès. The first was

his contact at Vogue, whose name he could not remember. That was on December 1. The second was another person at Sotheby's, who he wanted to use to get to Hermès onboard on December 4.

If Mr. Quan was reaching out to Hermès, why would Mr. Rothschild in two different discussions then suggest two other lines of communication, both of which he couldn't -- well, sorry.

This gets even more -- we know that when Mr. Rothschild approached Mark Berden, he said Hermès might be involved with this project. That was clearly before Mr. Rothschild was talking with Mr. Quan, with Sotheby's, or Vogue.

We also heard about Aaron Maresky. We saw Mr. Rothschild was hoping for a collaboration with Mr. Mareksy's company. And Mr. Maresky immediately asked whether the relationship with Birkin was official. And Mr. Rothschild responded that he was pushing it for it.

We also know Mr. Rothschild told his childhood friend Eric Ramirez that Hermès might partner with him, and that he was negotiating with them. But we know that Hermès has no record of Mr. Rothschild reaching out, and has no record of anyone reaching out on his behalf.

Simply put, Mr. Rothschild was misleading people.

The reason for bringing up these text messages isn't to embarrass Mr. Rothschild. Rather it is to show something

this disclaimer was after Hermès -- was not even after this article. It was several days later, after Hermès actually sent the cease and desist. And we know that the disclaimer didn't remedy confusion.

And now at one point during this trial Judge Rakoff asked Mr. Rothschild whether he was trying to reference Hermès' Birkin bag. His response is that he was in some ways. We will talk about that again.

But in Yahoo Finance he was a bit more plain about his intentions. He wanted to take the iconic Birkin handbag and bring it into the metaverse.

Can be there any clearer evidence that Mr. Rothschild was trying to trade off of Mr. Hermès goodwill?

Perhaps Mr. Rothschild will argue that he tried to correct mistakes, and if he did, it was clearly only after he received the cease and desist letter from Hermès.

Mr. Chavez, Mr. Martin, Mr. Rothschild, Mr. Moulin, and Dr. Kominers all told you that the metaverse is the future or part of the future for fashion. Everyone knows this. They all cited examples Gucci, Prada, Balanciaga, Nike, and Adidas, among others.

Mr. Rothschild as a trend forecaster -- remember he said he is a trend forecaster and a marketer -- clearly understood that brands were entering the metaverse. It is beyond question that he was trading off the two Birkin

people. You know, if he'd done that, then he's done a very, very bad job.

I think at the end of the day, your Honor, all this evidence points in the same direction. It points toward you granting a JMOL on all these claims. Thank you.

THE COURT: Well, I am second to none in my admiration for the eloquence of counsel for both sides.

I purposely held off ruling on this motion till I heard summations from both sides, because, as I expected, that was the occasion for counsel to draw my attention, as well as the jury's, to specific items of evidence in this case. And it's very important because the First Amendment issue in this case came down, as I've already indicated earlier today, to a question of the defendant's intent. I say that because recognizing the importance of the First Amendment issue in this case, I made determinations in defendant's favor that might arguably have been avoided.

For example, even though I think there is a nonfrivolous argument that the defendant was not making use of the MetaBirkins -- excuse me, of the Birkins mark or the Birkins design for artistic purposes and, therefore, would not satisfy the first prong of the *Rogers* test, I concluded in the end that there was at least an element of artistry involved from the outset and so instructed the jury.

Similarly, even though I think there is an argument

that the use of the term "MetaBirkins" in the website and throughout was explicitly misleading on its face and, therefore, would satisfy the other prong of *Rogers*, I concluded in the end that that was not a question that should go to the jury in those terms because of the breadth that must be given to artistic expression and constitutionally protected rights under the First Amendment.

But I think now defense counsel goes too far in suggesting that no rational juror could find for plaintiff. In the end, I found that Mr. Rothschild would be entitled to his First Amendment protection unless plaintiff could prove that his intent was to deceive the persons to whom he was advertising his product and make them believe that it was an Hermès product. And if he did that, as I have already indicated, and I think implicitly both counsel have agreed, then he forfeited the First Amendment protection to which he otherwise might be entitled.

Notwithstanding the excellent arguments just made by defense counsel, I think there is ample evidence from which a jury could conclude that Mr. Rothschild is a classic conman; it's just that he's not yet gotten good enough to avoid, for example, revealing what's really in his heart in emails that he believes are private at the time. But, nevertheless, there is ample evidence from which a rational juror could, if they wish — and there's certainly contrary evidence as well — conclude